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Adopted: February 13, 1997 ; Released: February 20, 1997

1. In this order, we grant in part the exceptions filed by James A. Kay, Jr. to a decision which revoked his Part 90 radio licenses and ordered him to forfeit \$75,000.00; we also vacate that decision and remand for a hearing. See Summary Decision of Administrative Law Judge Richard L. Sippel, 11 FCC Rcd 6585 (ALJ 1996). (S.D. paras. 35-37).

2 In essence, the ALJ held that during a compliance inquiry Kay willfully violated the Communications Act, 47 U.S.C. § 308(b), and the Commission's rules, 47 C.F.R. § 1.17, by failing to provide requested "loading" information about the number of end-users on each of Kay's base stations (S.D. paras. 24-26), that this violation continued during discovery when Kay's repeated refusals to produce relevant information resulted in a "grave abuse of the Commission's processes...." (S.D. paras. 27-30) and that Kay's "continuous violation" warrants license revocation and forfeiture (S.D. paras. 35, 37).

3. Our review of the record establishes that genuine, disputed issues of material fact were raised by Kay's Declaration that he did not maintain historical loading information but that he had produced all of his business records. See Weyburn Broadcasting Ltd. Partnership v. FCC, 984 F.2d 1220, 1227 (D.C. Cir. 1993)(hearing must be held where substantial and material questions of material fact remain). The Wireless Bureau attempted to refute Kay's Declaration during oral argument before the ALJ, but its substantial representations were not supported by documentary evidence or other materials which could be officially noticed, and many of the crucial factual representations were made by a non-attorney, contrary to the provisions of 47 C.F.R. § 1.21(a). We therefore vacate the summary decision and remand the case for further proceedings in accordance with this order.

## BACKGROUND

4. Specialized mobile radio (SMR) channels were first authorized in 1974 to meet the mobile communications needs of "end-users" or customers such as plumbers, carpenters, doctors, taxicabs, oil riggers, or other types of commercial entities. See Report and Order, 3 FCC Rcd 1838, 1839 ¶ 17 (1988). An SMR system consists of a base station, transmitters, antennas, and end-users utilizing mobile radio equipment. SMR channels are operated both in the conventional and trunked mode. A conventional system allows the end-user to use only one channel so that if someone else is using that channel, the user must wait until it is available. A trunked system combines channels and includes switching equipment which searches for an open channel. Channel utilization or "loading" standards were prescribed by the Commission because of the scarcity of radio spectrum. "[T]runked systems will be authorized on the basis of a loading criteria of one hundred (100) mobile stations per channel," 47 C.F.R. § 90.631(a), and for conventional systems a minimum "of seventy (70) mobile stations for each channel authorized." 47 C.F.R. § 90.633(a).

5. Kay states that he has built his business over two decades and that he is "a small businessman" who operates 152 specialized mobile radio licenses "in the face of large corporate competitors" in the Los Angeles metropolitan area. Br. pp. 2 and 4. Numerous complaints were received about Kay's operations including allegations that he was "falsely reporting the number of mobile units he serves ... in order to avoid the channel sharing and recovery provisions of [the] rules." James A. Kay, Jr., 10 FCC Rcd 2062 ¶ 2 (1994) (Order to Show Cause), modified, 11 FCC Rcd 5324 (1996).<sup>1</sup> Section 308(b) of the Communications Act provides that: "The Commission at any time ... during the term of any such licenses, may require from [a] licensee further written statements of fact to enable it to determine whether ... such license [should be] revoked." Similarly, Section 1.17 of the rules authorizes the "Commission or its representatives ... in writing" to request such additional "written statements of fact relevant to a determination ... whether a license should be revoked...."

6. On January 31, 1994, the Commission's staff first served Kay with a letter of inquiry which, inter alia, directed him "to provide information detailing the loading of end users on Kay's base stations in order to assess Kay's compliance with the channel loading requirements of our rules. 47 C.F.R. §§ 90.313, 90.623, 90.627, 90.631 and 90.633." Kay was also requested to "substantiate the loading of his stations by providing customer lists and telephone numbers. Such business records are the Commission's acceptable proof of loading." James A. Kay, Jr., 10 FCC Rcd at 2063-64 ¶¶ 6-7, citing Amendment of Part 90 of the Commission's Rules to Eliminate Separate Licensing of End Users of Specialized Mobile Radio Systems, 7 FCC Rcd 5558, 5560 (1992). See also Report and Order, 7 FCC Rcd 6344, 6345 n. 21 (1992)(amending rules pertaining to end user and mobile licensing information).

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<sup>1</sup> Kay filed a Petition for Partial Reconsideration of the order modifying the Order to Show Cause on May 24, 1996, but, inasmuch as the ruling in question was an interlocutory one, Kay's Petition will be dismissed as provided in 47 C.F.R. § 1.106(a).

7. After an exchange of correspondence and extensions of time, the staff on June 10, 1994 repeated its request "for a list of users as of January 1, 1994," but indicated that it would "accept a list, as detailed in our January 31, 1994 letter, as of any date subsequent to January 1, 1994 convenient to Mr. Kay." (Emphasis in original letter.) Kay responded on June 24, 1994 that "[T]here is no date ... for which the submission of the requested information would be convenient." S.D. para. 9. Thereafter, the Commission specified the following issues for hearing:<sup>2</sup>

- a) To determine whether James A. Kay, Jr. has violated Section 308(b) of the Act and/or Section 1.17 of the Commission's Rules by failing to provide information requested in his responses to Commission inquiries;
- b) To determine whether [Kay] has willfully or repeatedly operated a conventional station in the trunked mode in violation of Section 90.113 of the Commission's rules;
- c) To determine if Kay has willfully or repeatedly violated any of the Commission's construction and operation requirements in violation of Sections 90.155, 90.157, 90.313, 90.623, 90.627, 90.631, and 90.633 of the Commission's Rules;
- d) To determine whether [Kay] has abused the Commission's processes by filing applications in multiple names in order to avoid compliance with the Commission's channel sharing and recovery provisions in violation of Sections 90.623 and 90.629;
- e) To determine whether [Kay] willfully or maliciously interfered with the radio communications of other systems, in violation of Section 333 of the Act;
- f) To determine whether [Kay] has abused the Commission's processes in order to obtain cancellation of other licenses;
- g) To determine, in light of the evidence adduced pursuant to the foregoing issues, whether [Kay] is qualified to remain a Commission licensee;
- h) To determine if any of Kay's licenses have automatically cancelled as a result of violations listed in subparagraph (c) pursuant to Sections 90.155, 90.157, 90.631, or 90.633 of the Commission's rules....

8. As part of its prehearing discovery, on February 17, 1995, the Wireless Telecommunications Bureau in an interrogatory asked Kay to "identify each and every 'end-user'

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<sup>2</sup> 10 FCC Rcd at 2064-2065 ¶ 10.

(i.e. customer)" for each of his 152 licensed stations and "the number of mobile units of each such 'end-user' ... since January 1, 1991." S.D. para. 10. Later, a Motion to Compel a response to its interrogatory was filed by the Bureau on May 30, 1995, and after an unsuccessful attempt to settle the case, the ALJ ordered Kay to make a thorough disclosure of the loading information requested by the Bureau in its interrogatory. See Order, FCC 95M-203, released October 31, 1995. On December 4, 1995, the Bureau, alleging that: "Kay failed to comply with [the ALJ's] Order," filed a "Motion for Summary Decision and Order Revoking Licenses." It sought summary resolution of the Section 308(b) issue specified in the Commission's Order to Show Cause, and revocation of Kay's licenses.

9. Kay's opposition to the motion for summary decision contained a Declaration under penalty of perjury dated December 15, 1995, from James A. Kay, Jr. which stated at pp. 1-2 that: "I do not maintain historical loading information .... I only have current information" which is maintained in two ways: first, paper files, and second, a computerized database. "Every one of these [paper] files was photocopied and provided to the Bureau. I have already supplied the Bureau with 36,000 documents.... The entirety of my customer database has already been printed out on paper and was previously supplied to the Bureau...."

10. At the oral argument on the Bureau's motion on March 31, 1996, Tr. 107-187, six persons entered appearances on behalf of the Bureau, Tr. 111-112, and two for Kay. Tr. 113-114. Thereafter, the presiding ALJ issued his Summary Decision on May 31, 1996, which summarized the background of the case (S.D. para. 1-17) and concluded that: "The factual issue is clear: Kay has repeatedly refused to furnish the Bureau information on loading that was requested under Section 308(b) of the Act and under the Commission's discovery rules. This leaves only questions of law to be decided." S.D. para. 18.

11. In response to Kay's objection that the Bureau's motion was not supported by an affidavit, the ALJ emphasized that 47 C.F.R. § 1.251(a)(1) requires that a motion for summary decisions be supported by affidavit "or by other material subject to consideration by the presiding officer." (emphasis by ALJ) S.D. para. 19. Here the "detailed correspondence sent to the Bureau on behalf of Kay" in response to the letters of inquiry and appended to the Bureau's motion (Attachments 1-5), the "discovery materials and pleadings and rulings of the Presiding Judge which are part of the litigation record of this case, and representations of Bureau staff and Kay's counsel made in oral argument," the ALJ held, were the "equivalent of an affidavit." Id.

12. On the merits of the motion, the ALJ agreed with the Bureau that the record before him established deliberate violations of the Communications Act and FCC Rules:

The first episode of Kay's refusal to provide loading data was initiated on January 31, 1994, when the Bureau requested information under Section 308(b). Kay's initial refusal extended to December 13, 1994, when the Commission released [its] Show Cause Order. During that ten month period of time, Kay was stonewalling the Bureau in its efforts to obtain [relevant] information....

There were circumstances which could have justified a reasonable delay in Kay's compliance.... However, even after extensions were granted by the Bureau and despite the ... substantial cutback on the scope of the request, Kay chose to reply on June 30, 1994, with unconcealed arrogance, that there would be no date subsequent to January 1994 that would be convenient for compliance with the Bureau's request.... There has never been a retraction of that open-ended refusal. [S.D. paras. 24, 25.]

"The second episode of stonewalling," the ALJ found, took place after designation for hearing, "when Kay came under an additional obligation to comply with discovery orders." S.D. para. 27. The ALJ explained that:

In discovery, Kay has admitted that he could obtain the loading information from customers. But rather than make the effort, Kay has advanced the argument that there is no obligation to respond to an interrogatory if that requires obtaining and assembling the data....

The Commission has instructed its mobile licensees that they must be prepared to furnish information on loading when required for compliance. Report and Order, ... 7 FCC Rcd at 6344-45.... Kay knew that such information could be requested. Yet he set up his business records in a manner that would not record loading data that was sufficient to show compliance. He cannot now be permitted to continue to flaunt the Commission's compliance regimen.... [S.D. paras. 28, 30.]

Ultimately, the ALJ held that Kay had frustrated the Bureau's efforts during the initial inquiry in 1994, that he continued to frustrate those efforts during discovery in 1995, and that: "There has been an egregious violation by Kay of the Communications law and policy set forth in § 308(b) of the Act and § 1.17 of the Commission's rules." S.D. para. 32. Although in its motion for summary decision the Bureau had only sought revocation of Kay's licenses, the ALJ sua sponte imposed a "forfeiture in the amount of at least \$75,000.00." S.D. para. 37.

13. In his Consolidated Brief and Exceptions Kay urges that the ALJ's summary decision resulted from "four fundamental errors." First, the ALJ relied on unsworn statements of the prosecutors, and ignored Kay's affidavit. Br. 5-9. Second, Kay was neither required to keep nor to produce the requested information because of a 1992 FCC deregulatory order. Id. 10-14. Third, Kay did not willfully fail to comply with the Commission's request for information before designation for hearing, and fully responded to a Bureau interrogatory during the discovery. Id. 14-17, 20-23. Fourth, the ALJ erroneously imposed a forfeiture which had not been sought by the Bureau in its motion for summary decision. Id. 24-25.<sup>3</sup>

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<sup>3</sup> Kay's January 17, 1997 Motion for Leave to File Supplement to his exceptions and the Supplement, in which he presents further arguments for reversal and remand, will be

## DISCUSSION

14. This is a revocation case in which the Commission designated seven issues regarding Kay's basic qualifications for evidentiary hearing. By operation of law, 47 U.S.C. § 312(d), both the burden of proceeding with the introduction of the evidence and the ultimate burden of proof were placed upon the Bureau. James A. Kay, Jr., 10 FCC Rcd at 2065 ¶ 15. In its motion for summary decision the Bureau relied on the same documents which were before the Commission when it ordered an evidentiary hearing on the Section 308(b) and other issues. The Summary Decision resolved the Section 308(b) issue, based on the ALJ's critical finding that Kay "set up his business records in a manner that would not record loading data that was sufficient to show compliance. He cannot now be permitted to continue to flaunt the Commission's compliance regimen...." S.D. para. 30.

15. On appeal Kay argues the ALJ erred when he ignored his Declaration, and instead relied on the unsworn representations of the Bureau staff. Br. pp. 5-9. The Bureau replies that the ALJ did not rely on "unsworn testimony" because its Motion for Summary Judgment was supported by Attachments 1 to 5, "the Bureau's Section 308(a) inquiry letters and Kay's written responses" and that the ALJ could, and did, officially notice the discovery pleadings and his own order in this case. Reply pp. 11-14. Thus, in granting Summary Decision, according to the Bureau, "the presiding Judge explicitly relied on documentary evidence proffered by the Bureau and the procedural record in this proceeding." Id. p. 14.

16. A Summary Decision, pursuant to 47 C.F.R. § 1.251, was not appropriate or justified in this case because it was inconsistent with three basic Commission requirements. First, in the report adopting the rule, the Commission indicated that summary decision is an "extraordinary procedure" which should be utilized only if the parties are in agreement regarding material factual inferences that may be properly drawn from the record. See Summary Decision Procedures, 34 FCC 2d 485, 487-88 (1972); Big Country Radio, Inc., 50 FCC 2d 967, 968 (Rev. Bd. 1975). Second, because this procedure deprives a licensee of an opportunity for an evidentiary hearing, the Commission has consistently held that critical and stringent standards must be applied in reviewing the papers of the party moving for summary decision to "insure due process." Midwest St. Louis, Inc., 48 RR 2d 95, 104 (1980), and Summary Decision Procedures, 34 FCC 2d at 488. On the other hand, "the opposing party's papers, if any, should be treated with considerable indulgence." Id. If substantial or material question of fact are raised by the papers a hearing must be held. Weyburn Broadcasting, 984 F.2d at 1229-1230. And third, the Commission in adopting the summary decision rule cautioned that, even when "the basic facts are conceded [about an event]..., expert or character testimony may still be appropriate to determine whether [a licensee] was acting in accordance with accepted industry or community practices, was ... acting in good faith, or for base or worthy motives." Summary Decision

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dismissed in light of the action taken by this order. Kay's July 1, 1996 Request for Oral Argument will be denied, inasmuch as argument would not materially assist resolution of this proceeding.

Procedures, 34 FCC 2d at 488 n. 3. "In such circumstances, summary decision of the basic facts would be appropriate, but a hearing on the inferences to be drawn from them or as to the ultimate findings of fact would also be appropriate." Id. (emphasis added). It is also significant that "the exercise of sound discretion applies only in denying such motions...." Big Country Radio, 50 FCC 2d at 968 n. 6.

17. Here Kay argues, with some justification, that contrary to Commission pleading requirements the ALJ ignored his Declaration while treating the Bureau's papers and arguments with indulgence. The record establishes that there was a fundamental disagreement between the parties in the motion papers. Thus, Kay's Declaration stated that he had now provided the Bureau with all of his business records, but the ALJ agreed with the Bureau that Kay had "set up his business records in a manner that would not record loading information" and that he should not be permitted "to continue to flaunt the Commission's compliance regimen." S.D. para. 30. This finding did not rest upon documentary evidence alone, as the Bureau now argues, since the Summary Decision itself states that it was based on the documentary evidence "and the representations of Bureau staff and Kay's counsel made in oral argument." S.D. para. 19. The record supports Kay's argument that the ALJ's finding was based upon factual representations made by the Bureau at the oral argument.

18. The transcript of the argument on the Bureau's motion establishes that one of the six persons who entered appearances for the Bureau, Mr. Terry Fishel, a non-attorney, was identified as the person with knowledge on matters relating to loading, end users, and commercial operation of Part 90 facilities. Tr. 111-112. Several times during the argument, Bureau counsel emphasized Fishel's long experience with the Commission's loading requirements and knowledge of industry billing practices. For example, one of the Bureau's counsel asserted that: "this is the first time we've ever come across anybody who told us they couldn't tell us what station their end users are operating on. And ... Mr. Fishel's been administering this since the earlier '70s." Tr. 120-121. Later, Fishel's knowledge and experience was used to support the Bureau's claim that ordinary business records should contain the information sought by the Bureau. Tr. 140-142. Mr. Fishel stated that:

I think what Mr. Kay is saying, or at least what's inferred by the information he's provided, is that he charges per location, even though he may have multiple stations at each of those locations.

I have not seen any time with the years that I've had that people charge per location rather than on a station basis. [Tr. 140.]

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From our perspective and from what we've seen [of Kay's records], they're completely inadequate. They're incomplete. There is not enough information there to identify whether the information he's provided in terms of the customers or the users are using all the systems equally or just ... a few of the

stations. We don't know how many stations each are using. [TR. 144.]

Mr. Fishel was also asked to respond to a hypothetical question about how a licensee could "give you a lot of information but [if] he didn't want to tell you about channels ... [h]ow would he do that? How would he keep that information from you? Would he just hit his computer and just pull out the channel on each of the documents?" Mr. Fishel responded: "Yes. It is quite possible...." Tr. 144-145. In light of the facts that the ALJ explicitly relied on these and other, similar representations by the Bureau and that Kay was afforded no opportunity for cross-examination or presentation of rebuttal evidence, it is clear that there was no basis for grant of the Bureau's motion for summary decision.

19. Even assuming that the ALJ had not relied on the Bureau's untested representations, summary decision should not have been granted because a question of fact was raised in light of the claim that Kay had established his business records so as to defeat legitimate compliance actions. The question regarding Kay's business records implicates questions about his motives, intent, and good faith that cannot be resolved against Kay without a hearing.

20. These are the types of matters which the Commission has stated must be resolved through an evidentiary hearing. Thus, since the ALJ's crucial finding implicated questions about Kay's business record keeping practices, his motives, and intent, Commission precedent requires a full hearing in which "expert testimony should have been taken" from both parties as to whether Kay was "acting in accordance with accepted industry ... practices, was acting in good faith, or for base or worthy motives." See para. 16, above. The Bureau's contentions at oral argument simply do not provide an adequate basis for relief regarding these factors which are deemed relevant by the controlling Commission precedent.

21. Furthermore, our review of the record reveals an additional matter which was not addressed by the ALJ's Summary Decision. In Kay's Opposition to the Bureau's Motion for Summary Decision, Kay asserts, in connection with his claim that he has turned over all of his business records, that he has provided information for each of his customers, including, inter alia, the name, address, phone number, number of control stations, number of mobile stations, and frequency/site or system (as appropriate). Kay also claims that he created and provided "loading reports" for each FCC call sign or group of call signs, listing the frequency/site or system and pertinent users by name. In its Reply filed January 26, 1966, the Bureau contends that, while Kay has disclosed "the number of mobile units claimed to be operating from a particular site on any of multiple stations," he has not disclosed "the number of mobile units claimed for each specific station...." However, the Commission has stated that it would credit individual SMR systems with all end users in their business records, including those end users who do business with more than one system in their area. Amendment of Part 90, 7 FCC Rcd at 5561 n. 30. In any event, while there is an open question as to whether the documents that Kay has submitted provide the information that the Bureau is seeking or whether, after a hearing, they would support a finding that Kay has provided adequate loading information for his licensed facilities, construing these documents in the manner most favorable to Kay, as summary decision rules require, raises the type of genuine, disputed questions of material fact that must be resolved by



evidentiary hearing and not summary decision. Weyburn Broadcasting, supra, 984 F. 2d at 1227.

22. In sum, the ALJ's Summary Decision revoking Kay's licenses and imposing a monetary forfeiture is not consistent with the applicable Commission and court standards regarding summary decision. It must therefore be vacated, and the case remanded for a full hearing on all issues designated for hearing by the Commission. A full hearing on all issues is required because the Commission does not favor bifurcated hearings in cases where it has ordered a hearing on multiple issues. In RKO General Inc., 61 FCC 2d 1062, 1064 (1976), the Commission observed that:

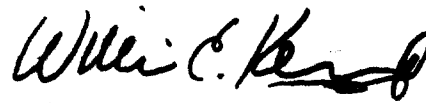
Where several issues are designated for hearing, the better procedure, and the one which conforms to established Commission policy, is for the presiding judge to take evidence and to make findings of fact and conclusions of law as to all issues in order to prevent needless remands. Alkima Broadcasting Company, 30 FCC 932, at page 933, n.2; Sayger Broadcasting Company, 32 FCC 493 at page 496, n.7.

23. Finally, Kay asserts in the conclusion to his brief, at p. 25, that: "Given the prejudgment of the case by the Judge, the remand should include a specific instruction that the Chief Administrative Law Judge appoint another Judge to preside over the matter so that the hearing is impartial and fair...." Kay, however, never sought disqualification of the presiding Judge for bias, nor has he attempted to comply with the requirements of the Commission's rules regarding disqualification of a presiding officer by filing an affidavit setting forth in detail the facts alleged to constitute grounds for disqualification. See 47 C.F.R. § 1.245(b)(1). An ALJ's adverse rulings, by themselves standing alone, even if erroneous, do not establish a lack of neutrality. See WWOR-TV, Inc., 5 FCC Rcd 2845 ¶ 6 (1990). Moreover, the Supreme Court has declared that: "judicial rulings alone almost never constitute valid basis for a bias or partiality motion." Liteky v. U.S., 114 S.Ct. 1147, 1157 (1994). Since Kay has not even attempted to comply with the requirements of the Commission's rules and precedent, his request does not warrant further consideration.

24. **ACCORDINGLY IT IS ORDERED**, That, pursuant to the authority delegated under 47 C.F.R. § 0.251(c), as amended, the Request for Oral Argument of James A. Kay, Jr. filed July 1, 1996 **IS DENIED** and the Consolidated Brief and Exceptions of James A. Kay, Jr. filed July 1, 1996 **ARE GRANTED** to the extent reflected herein and **ARE DISMISSED** in all other respects.

25. **IT IS FURTHER ORDERED**, That the Petition for Partial Reconsideration filed May 24, 1996 by James A. Kay, Jr., and the Motion for Leave to File Supplement and the Supplement filed January 17, 1997 by James A. Kay, Jr. **ARE DISMISSED**.

26. IT IS FURTHER ORDERED, That this proceeding IS REMANDED to the Administrative Law Judge for further proceedings consistent with this Memorandum Opinion and Order.

A handwritten signature in black ink, appearing to read "William E. Kennard", with a stylized flourish at the end.

William E. Kennard  
General Counsel